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A

Public Prosecutor v Ifeanyi Christian Nwankwo

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B–05–78-03 OF 2013
BALIA YUSOF, TENGKU MAIMUN AND HAMID SULTAN JJCA
11 JUNE 2014

C *Criminal Law — Dangerous drugs — Trafficking — Trafficking in 1839.3g of methamphetamine — Appeal against acquittal — Drugs found in three packets inside cylinder in bag carried by appellant — Packets marked as G4, G5 and G6 — Packets produced in court bearing markings G2, G3 and G4 instead — Packets produced in court not being able to fit into cylinder — Prosecution unable to explain orange tag found with exhibits — Real possibility that exhibits tampered with — Prosecution failing to prove identity of drugs seized*

D

E The appellant was charged for trafficking in dangerous drugs to wit 1,839.3g of methamphetamine. The drugs were found in three packets inside a cylinder in a bag carried by the appellant. The packets were seized by SP4 who marked the packets as G4, G5 and G6. SP4 then handed the packets with other items seized from the appellant to the investigating officer, SP6. The handing over list (exh P7) was signed by both SP4 and SP6. Although SP4 and SP6 had both

F testified that the markings of the three plastic packets were G4, G5 and G6, when the box containing the exhibits was opened in court during the examination in chief of SP4, the exhibits produced bore the markings of G2, G3 and G4 instead. The trial judge found that the prosecution had thus failed to prove the identity of the drugs seized. The trial judge held that the

G prosecution had failed to prove a prima facie case and therefore acquitted and discharged the accused. The prosecution appealed against this decision on the grounds that the trial judge erred in relying on ss 93 and 94 of the Evidence Act 1950 when His Lordship rejected the oral explanation made by SP4 as regards exhibit P7. It was argued that ss 93 and 94 must be read in the context of ss 91

H and 92 of the same Act and that ss 91 and 92 only apply to bilateral instruments and dispositive documents between contracting parties and not to the evidence of SP4 and SP6. The respondent contended that the explanation on the markings of the exhibit was an afterthought and that there are other infirmities in respect of the exhibits. In court, SP4 and SP5 tried to fit the packets

I containing the drugs into the cylinder but they found the packets too big. The packets could not fit into the cylinder. The other infirmity was in respect of the discovery in court of an orange tag. SP4 could not account for the orange tag found in the box. Hence, the respondent claimed that there was a real possibility that the exhibits were tampered with.

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Held, dismissing the appeal and affirming the order of acquittal and discharge:

(1) Sections 91 and 92 were not applicable to the present case. However, the trial judge who had heard the witnesses, was the best person to decide whether to accept or to reject the explanation given by SP4 that there was a mistake or a typographical error in exh P7 (see para 17).

(2) The trial judge rejected SP4's explanation on the exhibits for the reason that the error if any, could have been corrected by SP4 then and there as SP4 had done where he had included an item missed out earlier by putting his signature on the addition made to exh P7. There were sufficient grounds to support the said finding of the trial judge. The explanation of SP4 was that the markings in P7 were wrongly stated and that the correct markings ought to have been G2, G3 and G4 as seen from the exhibits produced in court. However, the 'silinder logam bersama penutup dan besi' had also been marked G2, G3 and G4 in exh P7. There was no explanation as to why SP4 had given the same markings G2, G3 and G4 to two different items ie the three transparent packets and the cylinder items. There was no explanation either as to whether there was a mistake in the markings of G2, G3 and G4 for the cylinder. Hence, the different markings on the exhibits stated in exh P7 and on the exhibits tendered in court had seriously compromised the identity of the drugs (see paras 19 & 20).

(3) There was nothing in the evidence to show the link between the orange tag and the appellant. Taking into account the evidence of SP4 that the tag had nothing to do with this case, coupled with the fact that the exhibits tendered in court bore different markings from what were listed in exh P7 and that the packets could not fit into the cylinder, there was a real possibility that the exhibits had been tampered with. The prosecution had thus failed to prove the identity of the drugs, the vital element of the charge against the appellant (see paras 22 & 23).

[Bahasa Malaysia summary

Perayu dituduh mengedar dadah berbahaya iaitu dadah methamphetamine sebanyak 1,839.3g. Dadah dijumpai dalam tiga paket di dalam silinder dalam beg yang digalas oleh perayu. Paket-paket tersebut dirampas oleh SP4 yang menanda paket-paket tersebut sebagai G4, G5 dan G6. SP4 kemudiannya menyerahkan paket-paket dengan item lain yang dirampas daripada perayu kepada pegawai penyiasatan, SP6. Senarai yang diserahkan (eksh P7) ditandatangani oleh kedua-dua SP4 dan SP6. Walaupun SP4 dan SP6 kedua-duanya telah memberi keterangan bahawa tanda-tanda kepada tiga paket plastik adalah G4, G5 dan G6, apabila kotak yang mengandungi ekshibit tersebut dibuka di mahkamah semasa pemeriksaan utama SP4, ekshibit yang dikemukakan sebaliknya mempunyai tanda G2, G3 dan G4. Hakim perbicaraan mendapati bahawa pihak pendakwaan oleh itu gagal untuk

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membuktikan identiti dadah yang dirampas. Hakim perbicaraan memutuskan bahawa pihak pendakwaan gagal membuktikan kes prima facie dan oleh itu melepaskan dan membebaskan tertuduh. Pihak pendakwaan merayu terhadap keputusan ini atas alasan bahawa hakim perbicaraan dalam bergantung ke atas ss 93 dan 94 Akta Keterangan 1950 apabila Yang Arif menolak penjelasan lisan yang dibuat SP4 mengenai eksh P7. Ia dihujahkan bahawa ss 93 dan 94 mesti dibaca dalam konteks ss 91 dan 92 Akta yang sama dan bahawa ss 91 dan 92 hanya terpakai kepada instrumen bilateral dan dokumen-dokumen *dispositive* di antara pihak-pihak yang berkontrak dan bukan kepada keterangan SP4 dan SP6. Responden berhujah bahawa penjelasan ke atas tanda ekshibit adalah sesuatu yang difikirkan kemudian dan bahawa terdapat kelemahan lain berkaitan ekshibit tersebut. Di mahkamah, SP4 dan SP5 cuba untuk memasukkan paket-paket yang mengandungi dadah tersebut ke dalam silinder tetapi mendapati paket-paket tersebut terlalu besar. Paket-paket tidak tidak boleh dimasukkan ke dalam silider. Kelemahan lain adalah berkaitan penemuan di mahkamah terhadap teg berwarna oren. SP4 tidak dapat memberi penjelasan mengapa teg oren dijumpai di dalam kotak tersebut. Maka, responden mendakwa bahawa terdapat kemungkinan tulen bahawa ekshibit diusik.

Diputuskan, menolak rayuan dan mengesahkan perintah pembebasan dan perlepasan:

(1) Seksyen 91 dan 92 tidak terpakai kepada kes ini. Walau bagaimanapun, hakim perbicaraan yang mendengar keterangan saksi-saksi, adalah orang yang terbaik untuk memutuskan sama ada untuk menerima atau menolak penjelasan yang diberikan oleh SP4 bahawa terdapat kesilapan atau kesalahan tipografi dalam eksh P7 (lihat perenggan 17).

(2) Hakim perbicaraan menolak penjelasan SP4 ke atas ekshibit atas alasan bahawa jika terdapat kesilapan, patut dibetulkan oleh SP4 pada ketika itu kerana SP4 telah melakukan di mana dia telah memasukkan item yang tertinggal sebelumnya dengan meletakkan tandatangannya ke atas tambahan yang dibuat kepada eksh P7. Terdapat alasan yang mencukupi untuk menyokong dapatan hakim perbicaraan. Penjelasan SP4 adalah bahawa tanda di P7 telah dinyatakan dengan salah dan bahawa tanda yang betul sepatutnya G2, G3 dan G4 seperti yang dilihat daripada ekshibit yang dikemukakan di mahkamah. Walau bagaimanapun, silinder logam bersama penutup dan besi juga ditanda G2, G3 dan G4 dalam eksh P7. Tiada penjelasan mengapa SP4 telah memberikan tanda yang sama G2, G3 dan G4 kepada dua item berlainan iaitu tiga paket lutsinar tersebut dan item silinder. Tiada penjelasan sama ada terdapat kesilapan dalam tanda G2, G3 dan G4 untuk silinder. Maka, tanda-tanda yang berbeza ke atas ekshibit yang dinyatakan di dalam eksh P7 dan ke atas ekshibit yang diserahkan di mahkamah secara serius kompromi identiti dadah tersebut (lihat perenggan 19 & 20).

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(3) Tidak terdapat apa-apa di dalam keterangan untuk menunjukkan hubungan di antara teg oren dan perayu. Mengambil kira keterangan SP4 bahawa teg tersebut tiada kaitan dengan kes ini, bersama fakta bahawa ekshibit yang diserahkan di mahkamah mempunyai tanda yang berlainan daripada apa yang disenaraikan di dalam eksh P7 dan bahawa paket-paket tidak muat untuk dimasukkan ke dalam silinder, terdapat kemungkinan tulen bahawa ekshibit telah diusik. Pihak pendakwaan oleh itu gagal untuk membuktikan identiti dadah tersebut, unsur penting tuduhan terhadap perayu (lihat perenggan 22 & 23).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 763–910.

Cases referred to

Datuk Haji Harun bin Haji Idris & Ors v PP [1978] 1 MLJ 240, FC (refd)
Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors [1997] 4 MLJ 329, HC (refd)
Lew Wai Loon v PP [2014] 3 MLJ 325; [2014] 2 CLJ 649, FC (refd)
PP v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180 (refd)

Legislation referred to

Evidence Act 1950 ss 91, 92, 93, 94

Appeal from: Criminal Trial No 45A-80 of 2011 (High Court, Shah Alam)

Munahyza bt Mustafa (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Ramkarpal Singh (Karpal Singh & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellant was charged for trafficking in dangerous drugs to wit 1839.3g of methamphetamine at Level 3, Main Terminal Building, Kuala Lumpur International Airport on 19 November 2010.

[2] In brief, the prosecution's case is as follows. The appellant was carrying two bags with him when he was detained by SP4. The bags were scanned. Nothing suspicious was discovered from the scanning. The bags were then physically inspected by SP4. In a black Samsonite bag having the name tag of the appellant (exh P19), SP4 found one cylinder (exh P23). From the cylinder, SP4 recovered three transparent packets which contained substances suspected to be drugs.

[3] The packets were seized by SP4. SP4 marked the three packets as G4, G5

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and G6. SP4 then handed the packets with other items seized from the appellant to the investigating officer, SP6. The handing over list (exh P7) was signed by both SP4 and SP6. The three transparent plastic packets were listed as item 8(3) of exh P7 with the markings G4, G5 and G6. SP6 confirmed that he had received the items from SP4 as per the markings. SP6 then made his own markings on the three plastic packets as E1, E2 and E3 before sending the exhibits to the Chemistry Department in a box marked E.

[4] Upon analysis, the chemist (SP5) confirmed that the substances from E1, E2 and E3 were 602.5g, 601.0g and 635.8g of methamphetamine respectively.

[5] At the end of the prosecution's case, the learned trial judge made the following finding:

> As the charge against the accused is possession of dangerous drugs for purpose of trafficking, the vital element of the charge is the dangerous drugs itself. It is incumbent upon the prosecution and in fact it is mandatory upon the prosecution to produce in court the very drugs that were seized from the accused. There cannot be any compromise in the identity of the drugs.
>
> In this case SP4 the raiding officer had handed over the all items seized from the accused to the investigating officer SP6 which included the three packets of drugs. In handing over the exhibits it is the norm among the police officers to prepare a handing over list. The purpose of handing over list is to corroborate the oral testimony of the police officers of the handing over and receipt of the seized items. In this case the handing over list was tendered and marked as P6 and bore the signature of both SP4 and SP6.
>
> It was clear from SP6 that before preparation of this list the incriminating items ie the Samsonite bag from which the car cylinder containing the 3 packets of drugs were found had been marked by SP4. The markings on the incriminating items are again a practice to corroborate the oral testimony of the raiding officer that these were the very items he had seized.
>
> It therefore becomes disastrous for the prosecution if the marking and the document instead of corroborating the oral testimony goes against it, as which has happened in this case. It is apparent from P6 that the 3 transparent packets had been marked G4, G5 and G6. However when the three transparent packets were produced in court the marking on them were G2, G3 and G4.
>
> SP4 tried to explain the discrepancies as a typo error on P6. It is rule of evidence that oral testimony cannot vary the contents of a document. There are 2 provisions of the Evidence Act 1950 which illustrates this.

[6] After adverting to the provisions of ss 93 and 94 of the Evidence Act 1950, the learned trial judge said:

> Further I cannot accept the fact that not 1 but 2 police officers overlooked the error if any on P6 as to the markings. If there was typo error as alleged by SP4 then it

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should have been corrected then and there as SP4 had chosen to do further down where he had included an item missed out earlier and signed on the addition made on the document.

To compound to the issue of identity of the drugs seized was the description given to the drugs seized when SP4 stated that the item seized was in the form of 'ketulan jernih' whereas the investigating officer described it as 'serbuk'. The 2 words 'ketulan' and 'serbuk' connotes 2 different forms. It was incumbent on the prosecution to clarify the actual form and not let the matter be hanging.

The final nail in the coffin on the issue of the identity in this case was when the remnants after analysis of the drugs seized were produced in court and the defence counsel asked to be demonstrated whether it could fit into the original wrappings it could be seen that the remnant drugs were too stiff and large to fit into the wrappings.

The explanation given by the chemist (SP5) was that after 2 years the substances had solidified and no more in the loose form and therefore that could be the reason why it could not fit in the original packet despite the fact part of it had been taken for analysis. I could not accept this explanation of the chemist as she was merely speculating ...

As a final determination of this case and as a result of the failure of the prosecution to prove the identity of the drugs seized, I ruled that the prosecution had failed to prove a prima facie case against the accused. I therefore directed the accused to be acquitted and discharged of the charge against him.

[7] Dissatisfied with the decision, the prosecution appealed to the Court of Appeal. Before us, the only issue canvassed by learned deputy public prosecutor was on the identity of the drugs.

[8] It was the submission of learned deputy that the three plastic packets were mistakenly marked by SP4 as G4, G5 and G6 in the handing over list, exh P7 and that notwithstanding the mistake, SP4 and SP6 identified their markings and signatures on the exhibits. It was further the submission of learned deputy that s 92 of the Evidence Act 1950 only applies to bilateral documents and that the law allows SP4 to correct his evidence.

[9] For the respondent, learned counsel submitted that the explanation on the markings of the exhibit was an afterthought and that there are other infirmities in respect of the exhibits. In court, SP4 and SP5 tried to fit the packets containing the drugs into the cylinder but they found the packets too big. The packets could not fit into the cylinder.

[10] The other infirmity was in respect of the discovery in court of an orange tag. SP4 could not account for the orange tag found in the box. According to SP4, the orange tag has nothing to do with this case. SP5 on the other hand said the orange tag was in the box together with the three plastic packets when SP6

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delivered the exhibits to her for analysis. SP6 said he only realised the presence of the orange tag when the box was opened by SP5 at the Chemistry Department. It was the submission of learned counsel that there was a real possibility that the exhibits were tampered with.

OUR FINDINGS

[11] To recapitulate, what had happened in this case was that although SP4 and SP6 had both testified (which testimony was consistent with exh P7) that the markings of the three plastic packets were G4, G5 and G6, when the box containing the exhibits was opened in court during the examination in chief of SP4, the exhibits produced (P33, P34 and P35) were not the exhibits marked G4, G5 and G6. Instead the exhibits bore the markings of G2, G3 and G4. Faced with the discrepancy, the learned trial judge in fact posed this question to SP4 'Tadi kamu kata kamu tanda bungkusan itu dengan G4, G5 and G6' to which SP4 answered 'Saya tak ingat' (RR1 p 39).

[12] In cross-examination (RR1 pp 49–50), the following was the evidence of SP4:

S: Setuju menurut P7, serah dan terima barang kes ini, memang wujud bungkusan-bungkusan yang kamu sendiri tandakan sebagai G4, G6 danG6

J: Ya.

S: G4, G5 dan G6 ini kamu telah pun menyatakan di sini sebagai bungkusan plastic lutsinar berbalut kertas karbon biru mengandungi Kristal. Itulah barang-barang yang disyaki dalam kes ini?

J: Ya.

S: So, saya katakan itulah tandaan yang dibuat oleh kamu pada masa itu untuk 3 bungkusan yang disyaki tersebut?

J: Ya.

S: Lain-lain tandaan tidak dibuat terhadap bungkusan-bungkusan tersebut?

S: Ya.

J: Ada 3 wrapper yang berwarna coklat, itu yang kami telah mark di mahkamah itu P33, P34, P35, betul?

J: Ya.

S: lanya ditanda di sana G2, G3 dan G6 kan?

J: G2, G3 dan G4.

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[13] At this juncture, SP4 did not offer any explanation on why the exhibits tendered in court had a different marking from what he had handed over to SP6. In re-examination (RR1 pp 61) the following question was asked by the learned deputy ... 'Boleh nyatakan mengapa tandaan pada plastic ini tidak sama sepertimana ditulis pada PIT'. The answer by SP4 was 'Saya tersilap tanda pada borang serah terima dan borang serah terima barang kes ini. Yang sebenarnya sepertimana yang tercatat pada P33, P34 dan P35'.

[14] The submission for the prosecution was that the learned trial judge erred in relying on ss 93 and 94 of the Evidence Act 1950 when His Lordship rejected the oral explanation made by SP4 as regards exh P7. It was argued that ss 93 and 94 had to be read in the context of ss 91 and 92 of the same Act; that ss 91 and 92 only applies to bilateral instruments and dispositive documents between contracting parties and that the provisions do not apply to the evidence of SP4 and SP6.

[15] In *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180, the learned trial judge said the following in respect of s 92:

> ... in the context of the wording in section 92 of the Evidence Act, the clause 'any matter required by law to be reduced to the form of a document' would appear to refer to bilateral instruments and dispositive documents only, such as contracts, grants or other disposition of property which the law requires to be reduced to writing, and not to every and all matters which the law requires to be reduced into a document, as for instance, the depositions of witnesses which, though required by law to be reduced to the form of a document, would not come within this section and oral evidence is therefore admissible to contradict such depositions.

[16] The Federal Court in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1978] 1 MLJ 240 agreed with the trial judge on the applicability of ss 91 and 92 of the Evidence Act 1950 (see also *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329).

[17] Based on the above authorities we agree with the learned deputy to the extent that ss 91 and 92 are not applicable to the present case. Be that as it may, it must be emphasised that the learned trial judge who has heard the witnesses, is the best person to decide whether to accept or to reject the explanation given by SP4 that there was a mistake or a typographical error in exh P7.

[18] In *Lew Wai Loon v Public Prosecutor* [2014] 3 MLJ 325; [2014] 2 CLJ 649 where the Federal Court was also dealing with the issue of identity of exhibits, His Lordship Richard Malanjum CJ (Sabah and Sarawak) said:

> [25] ... it is essential to first appreciate that an exhibit, perceivable by the senses and as distinguished from testimony, is part and parcel of evidence adduced during a trial. (See *R v Uxbridge Justices, Ex parte Sofaer & Another* (1987) 85 Cr App R 367;

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Butera v Director of Public Prosecutions (1987) 62 ALJR 7; *R v Stipendiary Magistrate at Lambeth & Another, Ex parte McComb* [1983] 1 All ER 321). It is real evidence as opposed to demonstrative or testimonial evidence. And evidence is the means by which a fact in issue is proved. (See *R v Osborne & Virtue* [1973] 2 WLR 209; *Thompson v R* [1918] AC 221). Further, before an exhibit is admitted into evidence the foundation for its admission must be established. Such foundation may be in the form of a fact or event that occurred and providing the reliability and trustworthiness of the exhibit as a piece of evidence. (See *R v Nikolovski* [1996] 3 SCR 1197 (Canada)).

[26] In other words, an exhibit, in a criminal or a civil trial, is physical or documentary evidence brought before the court. Its admission and reliance upon as a piece of evidence requires factual analysis of the facts and/or events that are relevant not only for its admission as a piece of evidence but that such facts and/or events may also be relied upon to test its reliability and trustworthiness as a piece of evidence. In short it is a fact sensitive exercise.

[19] Coming back to the instant appeal, the explanation by SP4 on the exhibits was 'Saya tersilap tanda pada borang serah terima dan borang serah terima barang kes ini. Yang sebenarnya sepertimana yang tercatat pada P33, P34 dan P35'. His Lordship had rejected the explanation for the reason that the error if any, could have been corrected by SP4 then and there as SP4 had done where he had included an item missed out earlier by putting his signature on the addition made to exh P7.

[20] We loathe to interfere with the finding of fact made by the learned trial judge. Further, we find that there are sufficient grounds to support the said finding of the learned trial judge. The explanation of SP4 was that the markings in P7 were wrongly stated and that the correct markings ought to have been G2, G3 and G4 as seen from the exhibits produced in court. However, the 'silinder logam bersama penutup dan besi' had also been marked G2, G3 and G4 in exh P7. There was no explanation as to why SP4 had given the same markings G2, G3 and G4 to two different items ie the three transparent packets and the cylinder items. There was no explanation either as to whether there was a mistake in the markings of G2, G3 and G4 for the cylinder. In the circumstances, we agree with the learned trial judge that the different markings on the exhibits stated in exh P7 and on the exhibits tendered in court had seriously compromised the identity of the drugs.

[21] Apart from that, when the box containing the exhibits was opened in court, SP4 was confronted with a foreign object ie an orange tag. The following evidence was elicited from SP4 in cross-examination (RR1 p 60):

> S: Dalam kotak jabatan kimia tu, tadi kita buka kotak itu bukan? Ada pakai pisau untuk buka kotak itu kan? Dalam kotak itu ada 3 bungkusan, ada juga satu barang macam berwarna oren kan? Apa itu?

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J: Ini adalah tag standby.

S: Kena mengena dengan apa ni? Adakah ini dicatatkan di mana-mana rekod yang disi oleh Inspektor seperti di dalam P6 dan P7. Adakah apa-apa rekod yang menyatakan tag standby seperti ini?

J: Tidak.

S: So, tag standby ini datang dari kes lain?

J: Saya tak tahu macam mana dia boleh ada dalam ini.

S: Bukan dari kes ini bukan?

J: Saya tak tahu.

S: So, saya katakan memandangkan tiada apa-apa rekod whatever it is, saya katakan ia tidak kena mengena dengan kes ini. Setuju bukan?

J: Ya.

[22] We are mindful of the evidence of SP5 and SP6 as to the discovery of the orange tag. In this regard, we find nothing in the evidence to show the link between the orange tag and the appellant. Taking into account the evidence of SP4 that the tag had nothing to do with this case, coupled with the fact that the exhibits tendered in court bore different markings from what were listed in exh P7 and that the packets could not fit into the cylinder, we are of the view that there is much force in the submission of learned counsel for the respondent that there is a real possibility that the exhibits have been tampered with.

[23] Having regard to all the above, we do not find any good reason to substitute the finding of the learned trial judge. In our judgment, the learned trial judge had not erred in finding that the prosecution had failed to prove the identity of the drugs, the vital element of the charge against the appellant. We therefore unanimously dismissed the appeal by the prosecution and affirmed the order of acquittal and discharge of the appellant.

Appeal dismissed and order of acquittal and discharge affirmed.

Reported by Kanesh Sundrum